

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HARRAH'S NC CASINO COMPANY, LLC AND/OR TRIBAL CASINO
GAMING ENTERPRISE OF THE EASTERN BAND OF CHEROKEE
INDIANS 1/

Employer

Case No. 11-RC-6469

and

TEAMSTERS LOCAL UNION NO. 61, AFFILIATED WITH
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The labor organization(s) involved claim(s) to represent certain employees of the Employer.
3. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) (7) of the Act for the following reasons: 2/

SEE ATTACHED

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **March 22, 2002**.

Dated March 8, 2002

At Winston-Salem, North Carolina

/s/Willie L. Clark, Jr.

Regional Director, Region 11

1/ The names of the "employer(s)" appear as amended at the hearing.

2/ The Tribal Casino Gaming Enterprise (herein called TCGE) is a commercial enterprise of the Eastern Band of Cherokee Indians, authorized by the Indian Gaming Regulatory Act of 1988 and the Tribal State Compact of August 11, 1994. It is located in Cherokee, North Carolina, on the reservation of the Eastern Band of Cherokee Indians (herein called Tribe) where it is engaged in the operation of a gaming casino, restaurants, eating facilities, and retail shops open to the general public, including persons who are not members of any Indian tribe. During the past 12 months, the TCGE derived gross revenues in excess of \$500,000.00, and during the same period purchased and received goods and materials valued in excess of \$50,000.00 from points directly outside the State of North Carolina.

Harrah's NC Casino Company, LLC (herein called Harrah's) is a North Carolina Corporation with offices located in Cherokee, North Carolina where it is engaged in providing managerial services to the TCGE in its operation of a gaming casino, restaurants, eating facilities, and retail shops open to the general public, including persons who are not members of any Indian tribe. During the past 12 months, Harrah's has derived gross revenues in excess of \$500,000.00 and during the same period purchased and received goods and materials valued in excess of \$50,000.00 from points directly outside the State of North Carolina.

The parties stipulated that "All gaming hosts, gaming technicians and administrators employed at Harrah's Cherokee Casino, excluding office clerical employees, guards and professional employees, and supervisors as defined in the Act," constitutes an appropriate bargaining unit should the National Labor Relations Board (herein called Board) assert jurisdiction herein. In that respect, the Petitioner contends that the Board should assert jurisdiction over the casino, notwithstanding its Tribal ownership and operation through the TCGE, and notwithstanding its location on the Tribal reservation. In addition, the Petitioner contends that the Board should find the TCGE and Harrah's to be joint employers. Both the TCGE and Harrah's contend that the TCGE is the employer of the employees in the stipulated bargaining unit. Furthermore, both of these parties contend that the TCGE is an entity of a federally recognized Indian tribe, operating on the Tribe's reservation, and thus is exempt from the Board's jurisdiction. As an alternate argument, the TCGE and Harrah's assert that if the Board finds a joint-employer relationship, the Board should find Harrah's to be exempt from jurisdiction because of the TCGE's direct control over labor relations.

All parties to the hearing have filed briefs which have been carefully considered.

The Tribe is a federally recognized Indian tribe located on a reservation in Cherokee, North Carolina. The reservation consists of approximately 56,000 acres and is held in trust by the federal government for the Tribe. The Tribe is governed by a tribal charter and governing elected officers. The officers are grouped into an Executive Committee, composed of the Principal Chief (herein called Chief) and the Vice-Chief, and a 12 member Tribal Council (herein called Council). All elected officers (i.e. - the Chief, Vice-Chief and Council) must be enrolled members of the Tribe. The Executive Committee is responsible for executing the tribal laws and administering the daily operations of the Tribe. The Council is a legislative body, and is responsible for directing the management and control of all property belonging to the Tribe. The Chief has the power to veto acts of the Council, but the veto will not prevail against a two-thirds vote by the Council. Currently, the Tribe has approximately 13,000 members.

On October 23, 1997, the Bureau of Indian Affairs issued a notice listing federally acknowledged tribes in the contiguous 48 states and Alaska. The Tribe was included on the list. The Bureau of Indian

Affairs further stated that the Tribe, by virtue of the notice, has "the immunities and privileges available to federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes."

The Indian Gaming Regulatory Act of 1988 (herein called IGRA) authorized various forms of gambling on Indian reservations and regulates the disbursement of funds from such gaming enterprises. Pursuant to the IGRA, the Tribe and the Governor of North Carolina began discussions regarding gaming on the reservation. These discussions resulted in a Tribal-State Compact, entered into on August 11, 1994, between the Tribe and State of North Carolina. Among other things, the Tribal-State Compact requires the Tribe to enact ordinances regulating gaming on the reservation and sets various standards for the facility.

Following the Tribal State Compact, the Council enacted the Eastern Cherokee Gaming Ordinance (herein called Ordinance) to regulate all forms of gaming on the Tribe's reservation. Among other things, the Ordinance provides for the continuation of the Cherokee Tribal Gaming Commission (herein called Gaming Commission) which consists of three enrolled Tribal members who regulate all forms of gaming on the Tribal reservation. The Gaming Commission maintains all powers necessary to effectuate the purposes of the Ordinance, including promulgation of gaming rules and auditing/internal control rules. The Gaming Commission's office is located within 500 yards of the casino.

In furtherance of establishing the casino, the Council enacted the Tribal Casino Gaming Enterprise Ordinance (herein called TCGE Ordinance) which created the TCGE, a single purpose instrumentality. The TCGE consists of a Board of Advisors (herein called TCGE Board) which is composed of five Tribal members who have "demonstrated their business acumen through past business or career successes." The TCGE Board members are appointed for 5 year terms by the Chief, subject to the approval of the Council. A TCGE Board Chairperson is elected from among the members at the first meeting of each fiscal year.

The TCGE Ordinance also provides that Harrah's will manage the casino pursuant to a Management Agreement dated June 19, 1996. The parties to the Management Agreement are the Tribe and Harrah's. The Management Agreement indicates that the Tribe selected Harrah's to help provide technical experience, expertise, and training for operating the casino.

The TCGE Ordinance provides that the TCGE Board is generally responsible for the oversight of the TCGE. Under the Management Agreement, Harrah's is responsible for the "day-to-day operation, development, management and maintenance of Gaming Enterprise, the administration and enforcement of personnel policies and hiring and termination of the employment of Gaming Enterprise Employees." The record demonstrates that such day to day operations and management are subject to the approval of the TCGE Board. In accordance with this responsibility, the TCGE Board meets weekly with Harrah's representatives (i.e. the General Manager and/or Assistant Manager of the casino - both Harrah's employees) to discuss workplace issues and performance. In addition, the TCGE Board conducts weekly tours of the facility.

To help with the day to day operation of the casino, the TCGE Board employs an on-site Tribal Representative whose duties include: reviewing job descriptions, communicating with Harrah's management on a daily basis, intervening in employee -managerial relations, and attending weekly senior management meetings and departmental meetings. The Chairperson of the TCGE Board testified that the Tribal Representative acts as the "eyes and ears" of the TCGE Board. The Tribal Representative formally reports to the TCGE Board once a week in a face-to-face meeting and a written report. He/she may also

communicate with the TCGE Board informally via telephone and e-mail on a daily basis. Harrah's has no input in the selection and/or hiring of the on-site Tribal Representative.

The casino officially opened November 1997. It is located on Highway 19 North in Cherokee, North Carolina, approximately a half a mile from downtown Cherokee. The casino is entirely within the bounds of the Tribal reservation. The TCGE offices are located on Highway 19 about a mile and a half east of the casino. The TCGE offices are also located within the bounds of the Tribal reservation.

At hearing, it was undisputed that the casino is owned solely by the Tribe. Harrah's maintains no ownership interest in the casino. Moreover, all of the employees in the stipulated bargaining unit are on the TCGE payroll.¹

In determining whether an employer-employee relationship exists between an entity and employees in a petitioned unit, the Board looks to the entities control over various terms and conditions of employment. Specifically, the Board has found that the "decisive elements in establishing an employer-employee relationship are complete control over the hire, discharge, discipline, and promotion of employees, rates of pay, supervision, and determination of policy matters." Roane-Anderson Company, 95 NLRB 1501, 1503 (1951). The Board has further found that the control over the terms and conditions need not be absolute. Canned Foods, Inc., 332 NLRB No. 160 (2000) (citing Sun Maid Growers of California, 239 NLRB 346 (1978)). As long as the entity in question maintains "control over significant aspects of the employment relationship," allowing for effective bargaining, it is an "employer" under Section 2(2) of the Act. Id.

In the instant matter, the record demonstrates that the Tribe, by way of the TCGE Board, has complete control over the terms and conditions of employment of the employees in the stipulated bargaining unit. With regard to the recruitment of employees, Harrah's may propose recruitment plans to the TCGE Board, who reviews, approves and or modifies the plans to ensure recruitment at certain local events and in certain local areas.

At the hiring stage, the TCGE Board has final approval of all job descriptions. The job descriptions are classified by grade level. The Tribal Representative, acting as an agent of the TCGE, assists in the review and approval/disapproval of job descriptions for those employees hired into grades 1-17. Any job descriptions for grades 18 and higher, must be personally reviewed and approved by the TCGE Board. If the TCGE Board disapproves a job description it is not adopted. In addition, the TCGE Board has final approval on whether employees are hired on the Harrah's or TCGE payroll. For example, at one point, the new position of Casino Services Manager was created. Harrah's requested that the position be designated as a Harrah's position as opposed to a TCGE position. The TCGE Board opposed this request and the Casino Services Manager was hired on the TCGE payroll.

The TCGE Board's control over the hiring procedures is further evidenced by the fact that Harrah's initially proposed that all employees be classified as Harrah's employees, thus receiving Harrah's benefits. The TCGE Board immediately rejected this proposal, and currently all but 22 out of approximately 1522 employees are on the TCGE payroll.

The TCGE Board has final approval of all discipline and/or discharge of employees. Specifically, the personnel policies and procedures established by the TCGE Board provides for a progressive discipline system. This system can not be altered by Harrah's. In addition, the TCGE Board established a Board of

¹ The TCGE has its own payroll department.

Review, which offers an employee "a fair and equitable review of disciplinary and other job-related decisions affecting the employee." The Board of Review consists of an elected employee representative, the Tribal Representative and an independent manager. On all occasions, at least 2 of the representatives on the Board of Review are paid directly by the TCGE (i.e. the employee representative and the Tribal Representative). The Board of Review has the power to reinstate an employee with backpay, direct/modify/reduce/withdraw disciplinary action, and investigate and correct practices that may be detrimental to the casino or its employee. The final decisions of the Board of Review must be made by a majority vote and are deemed final and binding. Harrah's does not have the authority to change the Board of Review composition or procedures. For example, Harrah's could not insert an arbitration procedure into the Board of Review process without approval from the TCGE Board.

In regard to promotion opportunities within the casino, the TCGE Board has final approval of the organizational chart of the casino. In addition, the TCGE Board reviews and approves the training programs at the casino. As of today, there are 2 training programs geared to help employees and enrolled tribal members advance their careers at the casino. Both programs were reviewed and approved by the TCGE Board.

The TCGE Board has final approval of the compensation structure. Harrah's can propose compensation guidelines. However, the final review and approval comes from the TCGE Board. Thus, Harrah's is bound to operate within the compensation structure approved by the TCGE Board.

In regard to the daily supervision of employees, about 60% of the managerial positions are held by TCGE employees. Currently, all of the supervisors at the facility are TCGE employees. These supervisors have direct control over the first step of the progressive discipline procedure (i.e. they may conduct a "Verbal Coaching"), though testimony indicated that the supervisor may confer with the manager of their department.

All of the employees in the stipulated bargaining unit are employed in the Games Department and are on the TCGE payroll. There are 3 casino manager positions and 6 games manager positions in this department. Currently, all of the casino manager positions are occupied by employees on the TCGE payroll. Four out of the 6 games manager positions are occupied by employees on the TCGE payroll. All of the supervisors in the department are on the TCGE payroll.

Finally, the TCGE Board has absolute control over the personnel policies, benefits and procedures applied to the 1500 employees on their payroll at the casino, including those in the stipulated bargaining unit. Specifically, the uncontroverted testimony indicates that Harrah's cannot amend or alter policies without the express approval of the TCGE Board. Such policies include the benefits policy offered to employees, which mirrors that of the Tribal government, and the Board of Review process/procedure established in the personnel policy. The lack of Harrah's control over benefits, is demonstrated by the fact that the TCGE Board opted to provide a defined pension plan to employees, though Harrah's "adamantly" opposed such a plan.

Based on the relevant facts as discussed above, I find that the TCGE, by way of its board, is the employer of the stipulated bargaining unit employees in that it maintains complete control over the unit employees' terms and conditions of employment at the casino.

When addressing jurisdictional issues relating to Indian tribal enterprises, the Board has found that a tribal council acting as a governing body for a reservation "...is a government both within the usual meaning of the word, and as interpreted and applied by Congress, the Executive and the Courts." Fort

Apache Timber Company, 226 NLRB 503, 506 (1976). In Fort Apache, the Board held that the equivalence of an Indian tribal council to a State or an integral part of the United States government, requires the implicit exemption of such tribal councils and their self-directed enterprises on the reservation, from the Act based on their governmental entity status. Id. at 506. See also, Southern Indian Health Council, Inc., 290 NLRB 436 (1988).²

The undisputed evidence in the record herein demonstrates that the Council, acting in accordance with the Executive Committee, is the governing body of the Tribe. As the governing body of the Tribe, the Council and Executive Committee are exempt from the Board's jurisdiction under the Act based on their governmental entity status. During the hearing the parties stipulated that the TCGE is a "commercial enterprise" of the Tribe. However, it remains undisputed that the casino is located on the reservation and is wholly owned by the Tribe. Therefore, I find that the TCGE is a Tribal self-directed enterprise located on the Tribal reservation, and as such it is exempt from the Board's jurisdiction under the Act.

In sum, I find that the TCGE employs the employees in the stipulated bargaining unit. Based on the TCGE's tribal entity status, it is not an "employer" within the meaning of Section 2(2) of the Act. I note that the Petitioner at no time sought to represent the employees in issue with Harrah's as the sole employer. Moreover, to the extent that the parties argue a joint employer relationship exists, it is clear from the record that the TCGE exercises complete control over the terms and conditions of the employees in the bargaining unit sought herein and thus, a joint employer relationship does not exist.³ Accordingly, I hereby dismiss the petition.

177-1650-0000-0000
133-8000-0000-0000
177-1600-0000-0000
177-1683-1200-0000

² The Board has asserted jurisdiction over tribal enterprises located off the reservation and enterprises on the reservation which are completely managed and controlled by a non-tribal entity. Devils Lake Sioux Manufacturing Corporation, 243 NLRB 163 (1979); Sac and Fox Industries, Ltd., 307 NLRB 241 (1992); Yukon Kuskokwim Health Corporation, 328 NLRB 761 (1999). However, the factual circumstances presented in the above-cited cases are different than those in the instant matter, and thus are distinguishable.

³ All parties raise the issue of whether the TCGE and Harrah's are joint employers. Based on the uncontroverted testimony of the TCGE Board Chairperson and evidence presented at the hearing, I find, as stated above, that the TCGE maintains complete control of the terms and conditions of employment at the casino through final approval of all policies and procedures. Harrah's merely implements the policies and procedures approved and mandated by the TCGE Board. Thus, such terms are not shared or co-determined, as mandated by a joint employer relationship. Boire v. Greyhound Corp., 376 U.S. 473 (1964); NLRB v. Browning-Ferris Industries, 691 F.2d 1117, 1122 (3rd Cir. 1982), *enfg.* 259 NLRB 148 (1981).